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No. 48416-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Logan Newland,**

Appellant.

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Lewis County Superior Court Cause No. 14-1-00750-1

The Honorable Judge Richard Brosey

**Appellant's Opening Brief**

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. Ineffective assistance of counsel deprived Mr. Newland of his rights under the Sixth and Fourteenth Amendments.
2. Defense counsel provided ineffective assistance by failing to object to inadmissible profile evidence.
3. Mr. Newland was prejudiced by his attorney's deficient performance.

**ISSUE 1:** Evidence on the "grooming" process is inadmissible in a sex case because it has "virtually no probative value" but encourages the jury to find guilt based on characteristics of other offenders. Did Mr. Newland's attorney provide ineffective assistance of counsel by failing to object to extensive "grooming" testimony at trial?

4. The court violated Mr. Newland's Sixth and Fourteenth Amendment right to counsel by improperly limiting his attorney's closing argument.
5. The court violated Mr. Newland's Fourteenth Amendment right to due process by improperly limiting his attorney's closing argument.
6. The court erred by sustaining the state's objections to Mr. Newland's closing argument.

**ISSUE 2:** A trial court violates an accused person's rights to counsel and to due process by improperly limiting defense closing argument. Did the court violate Mr. Newland's rights by prohibiting his attorney from arguing that the jury could infer that he denied the charges against him?

7. Mr. Newland's convictions were entered in violation of his Fifth and Fourteenth Amendment right to be free from double jeopardy.
8. The court erred by failing to instruct the jury that each of Mr. Newland's convictions had to be based on a "separate and distinct act."

**ISSUE 3:** In a case alleging multiple counts of the same charge, the court must instruct the jury that each conviction must be based on a "separate and distinct act." Did the court violate Mr. Newland's right to be free from double jeopardy by

failing to inform the jury that each of his identical charges had to be based on a different alleged act?

9. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

**ISSUE 4:** If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Newland is indigent, as noted in the Order of Indigency?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Logan Newland met fourteen-year-old M.M.E. at church. RP 70.<sup>1</sup> She requested that he become her friend on Facebook and then she initiated an electronic conversation with him. RP 72.

Several months later, Mr. Newland was living in Montana when he learned that M.M.E. claimed that they had had sex. RP 344. He was charged in Washington with three counts of third degree rape of a child. CP 1-3.

During trial on the counts, M.M.E.'s testimony differed in several ways from the story that she had told before trial.

She testified that Mr. Newland brought a small four-wheeler with him to the second encounter. RP 154. But she told the police that he had it the first time they met. RP 153-154; Ex 5, p. 5.

She testified that Mr. Newland had only had a vehicle with him during the second of the three alleged incidents. RP 154. But she told the police that the first incident had occurred "outside of the vehicle." Ex 5, p. 4.

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<sup>1</sup> Each citation to the Verbatim Report of Proceedings refers to the consecutively numbered volumes from 9/8/15 through 12/2/15.

M.M.E. said at trial that Mr. Newland had ejaculated outside of her during each of the incidents. RP 161. But she told the police that he ejaculated inside of her. RP 162; Ex. 5, p. 7.

M.M.E. testified that the last episode had occurred during the winter. RP 162. But she told her counselor that the entire relationship had happened in the summer. RP 162.

M.M.E. testified at trial that she had been falling in love with Mr. Newland. RP 75, 86. She said that Mr. Newland had said nice things to her and told her that he loved her. RP 45. She claimed that the first sexual encounter with Mr. Newland happened the same day that they started talking via Facebook. RP 74. She never claimed that she'd ever received any gifts from Mr. Newland.

M.M.E.'s mental health counselor and a sexual assault nurse practitioner both discussed the "grooming" process at trial. The counselor described "grooming" as

... a process which [sic] somebody who is a sexual predator will engage in trying to get victims. They will treat them really nice or befriend them or give them gifts to tell them they are going to be there for them for the intent and purposes of winning their trust and to build a relationship with them ... for the purposes of having a sexual encounter.  
RP 46.

The counselor claimed that M.M.E.'s depression would make her more vulnerable to "grooming." RP 60. She said that it was a "red flag" for her

that Mr. Newland was allegedly being nice to M.M.E. because M.M.E. had problems in her family. RP 61. The counselor said that the “grooming” is “horrible” because “it sets that child up for a long time of mistrust.” RP 46.

The nurse also claimed that M.M.E. had been “groomed”:

...when you are 14 and you have an alleged offender who is 30 years older, that, in fact, what is happening is that there is a child who is being groomed.  
RP 195.

Mr. Newland’s attorney had moved *in limine* to exclude the counselor’s testimony about “grooming.” RP 17. But the court did not rule on the motion without first hearing what the counselor would say. RP 17. Defense counsel did not object to any of the evidence about “grooming” during the actual testimony. *See* RP 46, 195.

The prosecutor also discussed “grooming” during closing argument. RP 287. She said that the counselor and nurse had recognized Mr. Newland’s alleged behavior as “grooming” “right away.” RP 287.

During Mr. Newland’s closing argument, the prosecutor objected when defense counsel stated that “[his] client’s position is that he never had sex with M.M.E.” RP 299. The court sustained the objection. RP 299. Then the following exchange took place:

DEFENSE COUNSEL: If my client had admitted to [the officer] that he had had sex with [M.M.E.], don't you think that he would have testified to that on the stand?

PROSECUTOR: Objection.

DEFENSE COUNSEL: You don't have that.

COURT: I'll sustain that.

RP 300.

As a result of the court's ruling, defense counsel was not able to argue during closing that Mr. Newland denied having sex with M.M.E. RP 291-304.

The to-convict instructions for each of the three charges against Mr. Newland were identical. CP 44-46. The court's instructions did not inform the jury that each charge had to be based on a separate and distinct act. CP 35-53.

The jury convicted Mr. Newland of all three counts. CP 70.

This timely appeal follows. CP 90.

### **ARGUMENT**

#### **I. MR. NEWLAND'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO EXTENSIVE INADMISSIBLE PROFILE EVIDENCE.**

Mr. Newland did not befriend M.M.E. or gradually seek to increase her comfort in his presence. He did not form a close bond with M.M.E. He did not give her any gifts. Rather, M.M.E. asked him to be friends on Facebook and initiated a conversation with him. RP 72. She claims that they met up later the same day and had sex. RP 74.

Still, the state presented extensive testimony on the “grooming” process that “sexual predators” use to try to “get victims.” RP 46, 60, 195. M.M.E.’s counselor said that she was particularly susceptible to “grooming” because of the problems in her family. RP 61.

But there was no evidence that Mr. Newland had engaged in any “grooming behavior” with the possible exception of being “nice” to M.M.E. and allegedly saying that he loved her. RP 45. Indeed, M.M.E. admitted that she had initiated the relationship. RP 72.

Even if there had been evidence of “grooming,” expert testimony on the subject is inadmissible because it is profile evidence with “virtually no probative value.” *State v. Braham*, 67 Wn. App. 930, 937, 841 P.2d 785 (1992), *amended* (Jan. 4, 1993).

Mr. Newland’s attorney provided ineffective assistance of counsel by failing to object to the extensive, inadmissible “grooming” evidence. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel’s performance is deficient if it falls below an objective standard of reasonableness. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*<sup>2</sup>

Counsel provides deficient performance by failing to object to inadmissible evidence absent a valid strategic reason. *Saunders*, 91 Wn. App. at 578 (citing *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and the result of the trial would have been different without the inadmissible evidence. *Id.*

Expert testimony on “grooming” is inadmissible profile evidence in a sex case. *Braham*, 67 Wn. App. at 937; ER 403. Such evidence has “virtually no probative value” and is unduly prejudicial when it is used to imply a specific person’s guilt based on characteristics of known offenders. *Id.* at 939.

Here, the state elicited evidence on the “grooming” process in order to argue that Mr. Newland was more likely guilty because he was “nice” to M.M.E. and allegedly said that he loved her. RP 45. The evidence also encouraged the jury to infer that M.M.E. was more likely to have been sexually abused because the problems in her family made her especially vulnerable to “grooming.” RP 61.

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<sup>2</sup> Ineffective assistance raises an issue of constitutional magnitude that the court can consider for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a)(3).

The extensive testimony about the “grooming process” was inadmissible in Mr. Newland’s case. *Id.* A reasonable defense attorney would have objected. Mr. Newland’s lawyer provided deficient performance by failing to protect his client from the irrelevant, highly-prejudicial evidence. *Saunders*, 91 Wn. App. at 578.

There was no valid tactical reason underlying defense counsel’s failure to object to the inadmissible profile testimony. *Id.* The evidence did not lend anything to the defense theory that M.M.E. had fabricated the allegations. Mr. Newland’s attorney should have objected.<sup>3</sup>

There is a reasonable probability that defense counsel’s failure to object affected the outcome of Mr. Newland’s trial. *Kyllo*, 166 Wn.2d at 862. The “grooming” evidence encouraged the jury to infer that Mr. Newland was more likely guilty because of M.M.E.’s vulnerable position and the way he had allegedly spoken to her online. The prosecutor relied on the evidence in closing, arguing that the nurse and counselor had recognized Mr. Newland’s alleged behavior as “grooming” “right away.” RP 287. Mr. Newland was prejudiced by his attorney’s unreasonable failure to object. *Kyllo*, 166 Wn.2d at 862.

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<sup>3</sup> Indeed, defense counsel demonstrated that he understood the prejudicial nature of “grooming” evidence by moving *in limine* to keep it out. RP 17. When the court did not rule on the motion *in limine*, however, Mr. Newland’s attorney should have renewed his objection when the evidence was offered.

Mr. Newland's defense attorney provided ineffective assistance of counsel by failing to object to inadmissible and highly-prejudicial profile evidence. *Saunders*, 91 Wn. App. at 578; *Braham*, 67 Wn. App. at 937. Mr. Newland's convictions must be reversed.

**II. THE COURT VIOLATED MR. NEWLAND'S RIGHTS TO DUE PROCESS AND TO THE ASSISTANCE OF COUNSEL BY PROHIBITING HIS ATTORNEY FROM POINTING OUT THE LACK OF EVIDENCE AGAINST HIM DURING CLOSING ARGUMENT.**

Mr. Newland's defense was a simple denial that he had had sex with M.M.E. He exercised his right to remain silent during trial, so his defense hinged on the jury's proper application of the state's burden of proof and of the presumption of innocence.

But when his attorney tried to argue during closing that he denied the allegations against him, the court sustained the state's objection. RP 299.

So defense counsel tried another angle. He instead attempted to argue that, if Mr. Newland had admitted to any of the allegations, the state would have elicited that evidence during trial. RP 300. The court prohibited defense counsel from making that argument as well. RP 300.

As a result of the court's rulings, Mr. Newland's attorney was never able to argue that the jury could infer that he contested M.M.E.'s

version of events. He was not able to point out that this case was a matter of M.M.E.'s word against Mr. Newland's.

The court violated Mr. Newland's rights to counsel and to due process by impermissibly limiting his closing argument regarding facts necessary for his defense. *State v. Frost*, 160 Wash. 2d 765, 772, 161 P.3d 361, 365 (2007).

The right to counsel protects the right of an accused person to have a closing argument given on his/her behalf. *Id.* (citing *Herring v. New York*, 422 U.S. 853, 858, 95 S. Ct. 2550, 2553, 45 L. Ed. 2d 593 (1975)); U.S. Const. Amend. VI, XIV. A trial court violates this right by unduly limiting the scope of defense counsel's closing argument. *Frost*, 160 Wn.2d at 773.<sup>4</sup>

Improper limitation of defense closing argument can also infringe an accused person's right to due process. *Id.* at 773 (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)); U.S. Const. Amend. XIV. This is because due process requires the state to prove every element of every charge beyond a reasonable doubt. *Id.* A trial court lessens the state's constitutional burden by prohibiting defense argument regarding any fact necessary for a charged offense. *Id.*

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<sup>4</sup> Trial court action limiting the scope of closing argument is reviewed for abuse of discretion. *Frost*, 160 Wn.2d at 771. A court abuses its discretion by limiting cross examination in a manner violating an accused person's constitutional rights. *Id.* at 768.

A jury may draw conclusions based either on the evidence or on the lack of evidence presented by the prosecution. CP 39. A trial court impermissibly limits the scope of defense closing argument by attempting to compel counsel to “draw only those inferences from the given facts which the court believes to be logical. *Frost*, 160 Wn.2d at 772.

During Mr. Newland’s trial, the court prohibited defense counsel from arguing that no evidence demonstrated that Mr. Newland had admitted to having sex with M.M.E. RP 299-300. Counsel’s prohibited argument was a permissible inference from the evidence and was directly relevant to the factual issues at stake.

The court’s ruling also precluded Mr. Newland from encouraging a key inference in his favor based on the lack of evidence from the state.

The court violated Mr. Newland’s right to counsel and to due process by improperly limiting his argument during closing. *Id.*

This error requires reversal unless the state can demonstrate beyond a reasonable doubt that “any reasonable jury would have reached the same result in the absence of the error.” *Id.* at 782. The *Frost* court found the error in that case harmless because the record included, *inter alia*, three taped confessions by the accused. *Id.*

The evidence at Mr. Newland’s trial, in contrast, was not overwhelming.

M.M.E.'s story changed over time. RP 154-155, 161-162. The jury could have interpreted the court's ruling as indicating a lack of evidence could not be held against the prosecution. The state cannot prove that this error was harmless beyond a reasonable doubt. *Id.*

The court violated Mr. Newland's rights to counsel and to due process by improperly limiting his defense attorney's closing argument on the lack of evidence against him. *Id.* at 773. Mr. Newland's convictions must be reversed. *Id.*

**III. THE COURT VIOLATED MR. NEWLAND'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY BY FAILING TO INSTRUCT THE JURY THAT EACH OF THE IDENTICAL CHARGES HAD TO BE BASED ON A SEPARATE AND DISTINCT ACT.**

The to-convict instructions for each of Mr. Newland's three charges were identical. CP 44-46. The court did not instruct the jury that each charge had to be based on a separate and distinct act. CP 35-53.

Accordingly, the jury likely believed that it could find Mr. Newland guilty of all three charges even if it found only that one of the allegations of intercourse had been proved beyond a reasonable doubt. Indeed, one proven incident would have fulfilled the requirements of each of the three to-convict instructions and would not have violated any other admonishment from the court.

Mr. Newland's convictions were entered in violation of his right to be free from double jeopardy. *State v. Mutch*, 171 Wash. 2d 646, 661, 254 P.3d 803, 812 (2011).

The constitutional prohibition on double jeopardy precludes multiple convictions based on a single act.<sup>5</sup> *Id.*; U.S. Const. Amend. V, XIV; Wash. Const. art. I, § 9. In a case with multiple indistinguishable charges, the court violates the rule against double jeopardy by failing to instruct the jury that each convict must be based on a "separate and distinct act". *Id.* at 662.

The reviewing court looks to the entire record but the standard is "among the strictest." *Mutch*, 171 Wn.2d at 664. That is, a double jeopardy violation occurs "if it is not clear that it was 'manifestly apparent to the jury that the State [was] not seeking to impose multiple punishments for the same offense' and that each count was based on a separate act." *Mutch*, 171 Wn.2d at 664 (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

At Mr. Newland's trial (as in *Mutch*), there was no instruction informing the jury that it had to rely on a "separate and distinct act" for each of the identical charges. RP 35-53.

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<sup>5</sup> Double jeopardy claims are reviewed de novo. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). A defendant may raise a double jeopardy claim for the first time on appeal. *Mutch*, 171 Wn.2d at 661; RAP 2.5(a)(3).

Where a verdict is ambiguous as to whether the jury improperly relied on the same conduct in returning guilty verdicts on different charges, the reviewing court must resolve the ambiguity in the defendant's favor. *State v. Kier*, 164 Wn.2d 798, 811-14, 194 P.3d 212 (2008).

Even looking to the entire record, it was not manifestly apparent to the jury that each charge against Mr. Newland had to be based on a distinct incident. *Id.* at 664. Though the prosecutor tied each charge to a different incident in closing argument, Mr. Newland's defense was based on the confusion and inconsistency in M.M.E.'s testimony. RP 291-304. The prosecutor also told the jury during rebuttal to focus on the fact and the instructions, not on "what the lawyers say." RP 304.

Unlike *Mutch*, Mr. Newland's case does not fall into the "rare circumstances" in which it was manifestly apparent to the jury that it had to base each charge on a separate and distinct act despite never being instructed on that requirement. *Id.* at 665.

Mr. Newland's convictions were entered in violation of the constitutional prohibition on double jeopardy. *Id.* His convictions must be reversed. *Id.*

**IV. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE TO IMPOSE APPELLATE COSTS UPON MR. NEWLAND, WHO IS INDIGENT.**

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 385-394, 367 P.3d 612 (2016).<sup>6</sup>

Appellate costs are “indisputably” discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wash.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Newland indigent at the beginning and end of the proceedings in superior court. Order Appointing Attorney filed 6-19-15, Supp. CP; CP 91-92. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

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<sup>6</sup> Division II’s commissioner has indicated that Division II will follow *Sinclair*.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

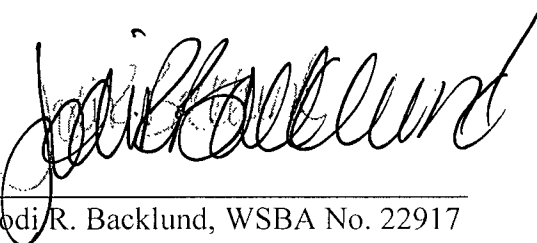
### **CONCLUSION**

Mr. Newland's defense attorney provided ineffective assistance of counsel by failing to object to extensive inadmissible grooming evidence. The court violated Mr. Newland's rights to counsel and to due process by improperly limiting his closing argument. Mr. Newland's convictions were entered in violation of the constitutional prohibition on double jeopardy because the jury was not instructed that each conviction had to be based on a separate and distinct act. Mr. Newland's convictions must be reversed.

In the alternative, if the state substantially prevails on appeal, this court should decline to order Mr. Newland – who is indigent – to pay the costs of his appeal.

Respectfully submitted on May 31, 2016,

**BACKLUND AND MISTRY**



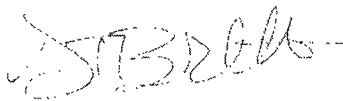
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CERTIFICATE OF SERVICE

I certify that on today's date:

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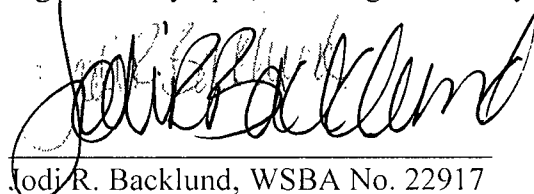
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I filed the Appellant's Opening Brief BY MAIL with the Court of Appeals, Division II, postage prepaid.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 31, 2016.



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